

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

GENEVA ROCK PRODUCTS, INC.,

Employer,

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNION NO. 3, AFL-CIO,

Case 27-UC-185

Petitioner,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL NO. 222

Intervenor.

DECISION AND ORDER

Upon a unit clarification petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, (herein, the Act), a hearing was held before Hearing Officer Nancy S. Brandt. Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board (herein, the Board) has delegated its authority in this proceeding to the Undersigned.

Upon the entire record in this proceeding, the Undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and they are hereby affirmed.
2. The Employer is a Utah corporation engaged in the business of producing asphalt, concrete, and related rock products for the construction

industry. In the course and conduct of its business, the Employer annually purchases and receives at its Utah facilities goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Utah. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the International Union of Operating Engineers, Local Union No. 3, AFL-CIO and International Brotherhood of Teamsters, Local No. 222 are labor organizations within the meaning of the Act.

4. By the filing of this unit clarification petition, the Petitioner proposes to clarify the bargaining unit in its collective bargaining agreement with the Employer to include individuals employed as dispatchers at the Employer's facilities located at Orem, Park City, and Helper, Utah.¹ Based upon the following discussion, the proposed clarification is not warranted.

The Employer's total operation is comprised of five divisions – concrete ready-mix, construction, equipment facilities, accounting, and sand and gravel. Within its concrete ready-mix division, the Employer maintains concrete mixing facilities, or batch plants, within the State of Utah at Ogden, Layton, Salt Lake City, West Valley City, Murray, Sandy, Orem, Park City and Helper.²

¹ The Intervenor does not seek to have the dispatchers added to the appropriate unit in its separate contract with the Employer. Rather, the Intervenor intervened in this proceeding for the purpose of opposing the proposed clarification of the Petitioner's contract with the Employer to add coverage for the dispatchers without a secret ballot election.

² At the time of the hearing, it was the Employer's intention to open a facility at Point of the Mountains on September 20, 1999 and at the same time to close its Sandy facility.

The Employer began its concrete division operations in 1954 at its Orem facility. In 1966, it added the Murray facility, and in 1981, the Park City facility was added. The Employer added its Layton, Ogden, Salt Lake City and Sandy facilities in 1990, pursuant to its purchase of Ideal Concrete. The Helper facility was added in about 1996, and, thereafter, the West Valley City facility was added to the Employer's operation.

For a number of years, the Petitioner has represented a unit of employees of the Employer, including mechanics, batch plant operators, and loader operators.³ Similarly, for a number of years, the Intervenor has represented a unit of truck drivers at the Employer's various Utah facilities.

The Employer's dispatch functions for its Ogden and Layton batch plants are performed from a central dispatch location situated adjacent to the Layton facility. The dispatch functions for the Salt Lake City, Murray, Sandy, and West Valley plants are also performed from a central dispatch located in Murray. This central dispatch is separate from the Murray batch plant. The dispatch functions for the Orem, Park City, and Helper batch plants are performed by dispatchers physically located in offices at those plants. At Orem, the Employer employs four full-time dispatchers and one part-time dispatcher. At Park City, there are two full-time dispatchers. At Helper, there is one full-time dispatcher. Historically, all of the Employer's dispatchers have been unrepresented.

All of the Employer's dispatchers are responsible for taking phone orders from customers. The dispatcher determines what the concrete is to be used for,

³ The batch plant operators and loader operators are employed in the Employer's concrete ready-mix division. The mechanics are employed in the equipment facilities division.

the amount needed, and what type of concrete is desired. At the time the order is taken, the dispatcher also checks the delivery schedule and informs the customer as to when the delivery can be made. Once the type of concrete mix and the delivery time have been determined, the dispatcher then checks the customer's account to ensure that it is in good standing. If the customer has no account and intends to pay cash on delivery, the dispatcher makes a note for the driver to advise him to collect the money before he dumps the concrete. If the customer intends to pay by check, the dispatcher calls the customer's bank to verify that sufficient funds are on hand.

In addition to taking orders, the dispatcher also monitors the delivery process through a system in the trucks that tells the dispatcher the location of each truck at any particular time.

Based on the number and size of the orders, the dispatcher also determines how many drivers will be needed for the following day and at what time. The dispatcher then notifies the drivers if and when they should show up for work the next day. The drivers are called out by seniority and the trucks are loaded by seniority.⁴

The Employer employs batch plant operators at all of its facilities with the exception of Orem, Park City, and Helper. They are responsible for mixing, or batching, the concrete and loading it onto the correct truck. The batch plant itself is a large machine which stores sand and gravel, cement powder, and various additives. Each truck has a computer order associated with it that shows the amount of the load and the concrete mix to be delivered. The batch plant

operator calls up the computer order associated with the particular truck.

Through use of a computer, the batch plant operator then operates the batch plant to weigh the various ingredients. The ingredients are then loaded onto the truck and mixed (dry mix plant), or they are mixed in a barrel connected to the batch plant and then loaded onto the truck (pre-mix plant).⁵ In addition to running the batch plant, the batch plant operator is also responsible for cleaning and maintaining the batch plant, jack hammering out the pre-mix barrels, doing yard work, and relieving the loader operator.

The Employer's loader operators, who are represented by the Petitioner, are responsible for loading the ingredients into the batch plant, performing maintenance on the batch plant and their own front-end loader, doing yard work, and monitoring the quality of the stockpiled ingredients to make sure they are free from debris.

The Employer's mechanics are responsible for maintaining the trucks and the batch plants and for making repairs to both.

As indicated above, there are no batch plant operators employed at the Orem, Park City and Helper facilities. Instead, the dispatchers at those locations have historically performed all of the batch work. Thus, they spend approximately 50% of their time dispatching and approximately 50% of their time performing batch plant operator work. But while the dispatchers perform the batch work at these locations, they do not perform the additional duties of the

⁴ As noted above, the Employer's drivers are represented by the Intervenor.

⁵ The Employer's Ogden, West Valley City, Helper and Park City plants are dry mix plants. The Layton, Salt Lake City, Murray, and Sandy plants are pre-mix plants. The Orem facility has both a dry mix and a pre-mix plant.

batch plant operator, such as cleaning and maintaining the batch plant, jack hammering the pre-mix barrel, doing yard work and relieving the loader operator. Instead, the loader operators at those three facilities perform those functions.

Initially, the Employer contends that the inclusion in the unit of the dispatchers at the Orem, Park City and Helper facilities would be inappropriate because they are supervisors, managers, and/or confidential employees.

The burden of proving supervisory status rests on the party alleging that such status exists. The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989); Northcrest Nursing Home, 313 NLRB 491, 496 fn. 28 (1993). In addition, the Board has held that conclusionary statements of a witness, without supporting evidence, is insufficient to establish supervisory authority. See American Radiator Corp., 119 NLRB 1715, 1718 (1958).

There is no contention or evidence that the dispatchers at issue here have the authority to independently hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances of employees. The Employer contends, however, that the dispatchers assign and responsibly direct the loader operators and the drivers. The Board has long recognized that not every act of assignment or direction makes an employee a supervisor. As with every statutory indicium, assignment and direction must be carried out with independent judgment in order to establish supervisory status. Mississippi Power & Light Co., 328 NLRB No. 146 (July 26, 1999). In the instant case, the evidence fails to show that the dispatchers' assignment and direction require the use of supervisory "independent judgment".

The Orem, Park City, and Helper facilities are each under the direction and control of a plant manager. In addition, there is a salesman at Orem and Park City who serves as the assistant plant manager. The plant managers and salesmen are salaried and do not punch a timeclock. The dispatchers at the three locations are hourly paid and punch a timeclock. They receive the same benefits as the Employer's management personnel. John Young, the Employer's concrete division manager, testified that the plant manager supervises the dispatchers and loader operators at Orem, Park City and Helper. Young also testified that the plant manager at those facilities is responsible for granting time off to the loader operators. The evidence shows that the dispatcher is responsible for scheduling the work time of the loader operator. However, this scheduling is based on the hours of operation of the batch plant, which, in turn, is based on the number and size of the orders to be filled that day. Accordingly, this scheduling function does not involve the exercise of independent judgment. In addition, the dispatcher informs the loader operator regarding the material to be loaded into the bins of the batch plant in the event of a specialty order.

Panaro & Grimes, d/b/a Azusa Ranch Market, 321 NLRB 811 (1966). The dispatcher also informs the loader operator if there is spillage under the batch plant that needs to be cleaned up. These functions involve only routine direction regarding the regularly assigned duties of the loader operator. They do not involve the exercise of independent judgment on the part of the dispatchers.

The dispatchers at Orem, Park City and Helper are also responsible for the daily "call-out" of the drivers. This "call-out" involves determining the number

of drivers needed and informing them as to when they should report to work. The determination of the number of drivers needed is based on the number and size of the orders to be filled. Thus, this determination is based on the experience of the dispatcher in estimating the number of drivers needed to complete the scheduled work. It does not involve supervisory judgment. In addition, the drivers are called-out by seniority and the trucks are loaded by seniority. Accordingly, the dispatchers' function in spacing out the reporting times of the drivers is a routine and ministerial function involving only an estimate of when a particular driver's truck will be loaded. SDI Operating Partners, 321 NLRB 111 (1996). In the event of inclement weather, the dispatcher will also notify the drivers not to report to work as scheduled. This function is obviously dictated by the weather and does not involve supervisory judgment.

The evidence also shows that the dispatchers assign the drivers to stand-by duties in the event of work delays caused by the cancellation of orders or other unforeseen events. The record does not indicate the frequency of such work delays. Moreover, Young testified that in those circumstances the Employer "like[s] to try to have things lined up for [the drivers] to be assigned to do." Accordingly, the dispatchers' assignment of work in these circumstances does not involve the exercise of independent judgment. Providence Hospital, 320 NLRB 717 (1996). The evidence also shows that in the event of a lack of pending orders to be filled, the dispatcher will decide whether the drivers will be sent home or asked to wait on stand-by. Again, the record fails to indicate the frequency with which such situations occur or, in fact, whether they have

occurred. Moreover, the record does not contain an explanation of the circumstances under which the drivers would be asked to remain on stand-by when there are no pending orders to be filled. Accordingly, I find that the evidence is insufficient to show that this function involves the exercise of independent judgment on the part of the dispatchers. JC Brock Corp., 314 NLRB 157 (1994); Chevron Shipping Company, 317 NLRB 381 (1995).

The Employer also asserts that the dispatchers are involved in the interview and hiring process for other dispatchers. However, Lynn Fuelling, the Employer's Park City plant manager, testified that the dispatchers did not interview applicants. He also testified that the dispatchers could be involved in the hiring process only to the extent that they might offer their general impressions of an individual who came in to fill out an application while Fuelling was absent from the facility, or by recommending the hire of a friend. Likewise, Steve Ewing, the plant manager of the Orem facility, testified only that the dispatcher might recommend someone that might be hired. Thus, contrary to the Employer, the evidence does not show that the dispatchers hire employees or effectively recommend such action.⁶ PHT, Inc., 297 NLRB 228 (1989); Bowne of Houston, Inc., 280 NLRB 1222 (1986); First Western Building Services, 309 NLRB 591 (1992).

The Employer also contends that the dispatchers effectively recommend whether drivers will be retained in employment after the conclusion of their probationary period. In this regard, Fuelling testified that he sits down with the Park City dispatchers on an informal basis and discusses the performance of

probationary drivers. However, his testimony failed to show that the dispatchers make effective recommendations regarding the retention of drivers. In fact, the sole example cited by Fuelling consisted of a dispatcher's recommendation that "maybe this is a case that you've got to consider." Thus, this testimony indicates that the plant manager considers and makes the retention decisions regarding drivers. Ewing testified that the dispatchers "sometimes" decide if a driver gets to stay or has to go. He also testified that the dispatchers "have a big say" in that decision. In addition, he testified that he "usually" relies on what the dispatchers report to him. Ewing cited no examples of any retention decisions which involved a dispatcher's recommendation. I find that this conclusionary testimony, without supporting evidence, is insufficient to establish that the dispatchers effectively recommend whether drivers will be retained in employment. Quadrex Environmental, 308 NLRB 101 (1992); Ten Broeck Commons, 320 NLRB 806 (1996).

The evidence shows that, in the absence of the plant manager and the salesman (at Orem and Park City), the dispatchers are "in charge" of their respective facilities for several hours each day. However, this, in isolation, is insufficient to establish the supervisory status of the dispatchers. Such secondary indicia, are insufficient to warrant a finding of supervisory status, absent evidence that the individual in question possesses primary authority set forth in Section 2(11) of the Act. JC Brock, *supra*. Moreover, the record does not indicate that the dispatchers exercise supervisory authority or judgment during these times. Adco Electric, Inc., 307 NLRB 1113 (1992). At most, the record

⁶ The plant manager of the Helper plant was not called to testify.

shows that the Orem drivers would go to the dispatchers for days off in the absence of the plant manager. But the record fails to show how frequently this occurs or what, if any, action the dispatchers can or do take in these situations. The evidence does not establish that the dispatchers regularly and independently grant time off to the drivers.

Based on the above, and the record as a whole, I find that the dispatchers employed by the Employer at its Orem, Park City and Helper facilities are not supervisors within the meaning of the Act.

As an alternative argument, the Employer contends that the dispatchers at Orem, Park City and Helper are managerial employees, and, thus, ineligible for inclusion in a unit of statutory employees. Managerial employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer and those who have discretion in performing their jobs. Reading Eagle Company, 306 NLRB 871, 872 (1992).

The Employer contends that the dispatchers are managerial employees, because they administer the Employer's collective bargaining agreements with the Petitioner and the Intervenor. However, this contention is based on the dispatchers' conduct in complying with contractual provisions such as calling out drivers by seniority and in observing the contractual quitting times. In this regard, the evidence shows that the dispatchers have no authority to respond to employee grievances on behalf of the Employer. By their conduct in complying with contractual provisions, the dispatchers do not "administer" the terms of the collective bargaining agreements. They do not formulate or develop the

Employer's policies or effectuate them with sufficient independent judgment or discretion to be considered managerial employees. North Arkansas Electric Cooperative, 185 NLRB 550 (1970).

The dispatchers also resolve customer complaints by adjusting the mix of a load or, if that is not possible, by dumping the load. However, the evidence shows that the drivers also have the authority to adjust the mix of a load after it has been loaded on their truck and that the Employer's batch plant operators can decide to dump or waste a load if the mix is not correct. Therefore, the evidence does not show that these functions are managerial in nature.

In the event of a slow market, the dispatchers have some discretion regarding pricing within set upper and lower limits which are provided to them by the Employer. Also, the dispatchers are required to verify that there are sufficient funds to cover a customer's check before an order is delivered. If the information obtained from the customer's bank is inconclusive, the dispatcher would normally not send out the load without first obtaining a supervisor's approval for the sale. Thus, the evidence shows that the dispatchers perform these duties within a narrow framework of established company policy from which they have little or no authority to deviate.

Based on the above, I find that the dispatchers are not managerial employees because they do not formulate or develop the Employer's policies and do not perform their duties with sufficient independent judgment or discretion.

As a second alternative, the Employer also argues that the petition should be dismissed because the dispatchers are confidential employees and should,

therefore, not be included in the unit. The Board applies a narrow test in determining whether an employee is “confidential”. In NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981), the Supreme Court affirmed the Board’s “labor nexus” test under which only those employees who act in a confidential capacity to persons exercising managerial functions in labor relations matters, and employees who have “regular” access to confidential information concerning anticipated changes that may result from collective bargaining negotiations are deemed confidential employees. The record here fails to show that the dispatchers have access to confidential information directly related to the formulation of the Employer’s labor relations policies or that they assist or act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations. As discussed above, the dispatchers do not administer the terms of the Employer’s collective-bargaining agreements either alone or in conjunction with its managers. In addition, the dispatchers’ presence in the office where personnel files of other employees are kept is not sufficient to establish that they are confidential employees. Albertson’s Inc., 307 NLRB 787 fn. 2 (1992). Accordingly, I find that the dispatchers are not confidential employees.

The Employer and the Petitioner were parties to a collective bargaining agreement effective by its terms from July 16, 1996 to July 15, 1999. On about July 26, 1999, the Employer and the Petitioner reached agreement on a successor collective bargaining agreement, which is effective by its terms from

July 16, 1999 to July 15, 2002.⁷ At the time of the hearing, the final draft of this agreement was still being reviewed by the Petitioner and had not been signed.

The instant petition was filed by the Petitioner on August 4, 1999. Thus, it was filed after the most recent negotiations were completed. The Board has traditionally declined to clarify a bargaining unit midway in the term of an existing collective-bargaining agreement that clearly defines the bargaining unit.

Wallace-Murray Corp., 192 NLRB 1090 (1971). The Board has held that to do otherwise would be unnecessarily disruptive of an established bargaining relationship. San Jose Mercury & San Jose News, 200 NLRB 105 (1972). The Board has extended this rationale to cases like the instant one in which a unit clarification petition has been filed prior to the signing of the collective-bargaining agreement, but after negotiations have ended and a contract has been agreed to. Edison Sault Electric Company, 313 NLRB 753 (1994). However, as an exception to the Wallace-Murray rationale, the Board has also found that a unit clarification petition filed shortly after a contract's execution was timely where the petitioning party had, during the course of negotiations, reserved its right to file. St. Francis Hospital, 282 NLRB 950 (1987).

Based on the rationale of Wallace-Murray, the Employer contends that the instant petition was untimely filed and should be dismissed, because the Petitioner waived its right to file by agreeing to the most recent collective-bargaining agreement without reserving this right during negotiations. On the other hand, the Petitioner contends that its petition was timely, because it had

⁷ The recently negotiated contract between the Employer and the Intervenor is also effective July 16, 1999 to July 15, 2002. That agreement also does not include dispatchers within its coverage.

reserved its right to file during the course of the negotiations. The record evidence in this regard is conflicting and does not show conclusively that the Petitioner did or did not reserve its right to file the instant petition.

Even assuming that the instant petition was timely filed under the rationale of St. Francis Hospital, I find that unit clarification is not appropriate under the circumstances presented here. In Union Electric Company, 217 NLRB 666, 667 (1975) the Board stated:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category--excluded or included—that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

Here, the record shows that the dispatchers at Orem, Park City and Helper do not come within a newly established classification or within a classification which has undergone recent, substantial changes in duties and responsibilities. Instead, the evidence shows that these jobs have existed for many years, that the duties and responsibilities have remained the same, and that these dispatchers have historically been excluded from the coverage of any bargaining unit. Consequently, the Petitioner's claims cannot appropriately be resolved in a unit clarification proceeding.

In addition, the Board has followed a restrictive policy in finding accretion, because it is reluctant to deprive employees of their basic right to select their own bargaining representative. See, e.g., Melbet Jewelry Co., 180 NLRB 107, 110 (1969). Consequently, the Board will find a valid accretion only when the additional employees share an overwhelming community of interest with the preexisting unit to which accretion is sought. Gitano Group, Inc., 308 NLRB 1172, 1174 (1992). I find that the dispatchers at issue do not share the required overwhelming community of interest with the preexisting unit represented by the Petitioner. Thus, while the dispatchers perform some functions which are the same as those performed by the batch plant operators, the batch plant operators also perform additional duties not performed by the dispatchers, such as cleaning and maintaining the batch plant, jack hammering out the pre-mix barrel and various yard duties. The dispatchers also perform duties that are not performed by the batch plant operators, i.e., dispatching duties.

Further, while the dispatchers have daily contact with the loader operators, the dispatchers have the same daily contact with the drivers represented by the Intervenor, and, thus, also have some community of interest with the drivers. In this regard, I note that the Intervenor, which represents the drivers, intervened in this proceeding on the basis of an authorization card signed by a dispatcher. Additionally, the Intervenor asserted at the hearing that an additional dispatcher is a former member of that labor organization, who gave up his membership solely because the dispatcher position was not covered by a collective bargaining agreement. In all these circumstances, the correct procedure to determine

representation of the dispatchers is through a petition filed pursuant to Section 9(c) of the Act seeking an election. Westinghouse Electric Corporation, 173 NLRB 310 (1968).

Based on the foregoing, I find that clarification is not appropriate. Accordingly, I shall dismiss the petition.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by October 22, 1999.

Dated at Denver, Colorado, this 8th day of October 1999.

Wayne L. Benson
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